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88-305

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIEL, JR.
CLERK

STATE OF SOUTH CAROLINA,
Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE EIGHTH AMENDMENT PRECLUDE A PROSECUTOR'S COMMENTS DURING A CAPITAL MURDER PENALTY PHASE ON PERSONAL CHARACTERISTICS OF THE VICTIM WHERE THE CHARACTERISTICS ARE BASED ON EVIDENCE ADMITTED IN THE GUILT PHASE TO SHOW THE CIRCUMSTANCES OF THE CRIME?

II. DOES BOOTH v. MARYLAND, 482 U.S. 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), PRECLUDE PROSECUTORIAL COMMENT DURING A PENALTY PHASE CLOSING ARGUMENT ON EVIDENCE INTRODUCED DURING THE GUILT PHASE OF THE TRIAL THAT REVEALS PERSONAL CHARACTERISTICS OF THE VICTIM?

III. WHETHER THIS COURT'S DECISION IN BOOTH v. MARYLAND, SUPRA, MISCONSTRUED THE REQUIREMENTS OF THE EIGHTH AMENDMENT AND WAS WRONGLY DECIDED?

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The Attorney General of South Carolina on behalf of the State of South Carolina petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of South Carolina that reversed and remanded a capital case for a new sentencing proceeding.

OPINION BELOW

The opinion of the South Carolina Supreme Court affirming in part,

reversing in part and remanding for a new sentencing proceeding was filed on June 6, 1988. The case is reported as State v. Demetrius Gathers, ___ S.C. ___, 369 S.E.2d 140 (1988), and is appended hereto as Appendix A at page 32. Judgment was entered and the remittitur sent to the Court of General Sessions of Charleston County, South Carolina, on June 20, 1988.

JURISDICTION

The petition for certiorari is for review of the opinion of the South Carolina Supreme Court, which is the direct appeal of a criminal murder conviction filed on June 6, 1988. This Court has jurisdiction to review the opinion rendered below pursuant to 28 U.S.C. § 1257(3) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the

United States Constitution which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves prosecutorial argument in a penalty phase of a capital murder trial that commented upon non-objected evidence that was introduced in the guilt phase of the trial. The comment and evidence revealed the personal characteristics of the victim at the time of the crime. The comment was held to violate the mandates of this Court's decision in

Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), because it focused extensively on the victim's character.

I. State Court Proceedings:

Demetrius Gathers was indicted at the January 12, 1987, and March 2, 1987, terms of the Court of General Sessions for Charleston County, South Carolina, for murder and criminal sexual conduct first degree. The prosecutor served his statutory notice of intent to seek the death penalty on January 14, 1987. Gathers stood trial before a jury and the Honorable Richard E. Fields, Presiding Judge, from March 16 to March 21, 1987. He was convicted of the crimes on March 20, 1987. On March 21, 1987, a penalty phase hearing was held before the same jury and judge. After hearing evidence in mitigation, the jury unanimously recommended that he be

sentenced to death by electrocution finding also the statutory aggravating circumstance of murder was committed while in the commission of criminal sexual conduct first degree. Judge Fields sentenced Gathers to death in accordance with the jury's decision.

Gathers appealed his sentence and conviction to the South Carolina Supreme Court. After briefing and oral argument, the Supreme Court issued its Opinion on June 6, 1988, affirming the conviction, reversing the death sentence and remanding for a new sentencing hearing. State v. Demetrius Gathers, S.C., 369 S.E.2d 140 (1988).

II. Pertinent Facts from the Trial.

The victim, Richard Haynes, a thirty-two year old black male was a self-proclaimed preacher who referred to himself as "Reverend Minister." At

around 10:00 p.m., on Saturday, September 13, 1986, Mr. Haynes left his parents' house for a walk on a bicycle path in a city park in Charleston, South Carolina. (Tr. p. 564). He carried with him various religious items, including Bibles, rosaries, statues, and various religious tracts such as the "Game Guys Prayer." During the trial, his mother testified that he carried his religious items and talks to people all the time about the Lord. (Tr. p. 563).

On that evening, Mr. Haynes went to a park bench. According to the testimony of Esdavan Hardrick, the Respondent, Demetrius Gathers, along with his confederates, came upon the victim who was changing his clothes and tried to engage him in some conversation. Sitting out on the bench were the Bible and some paper religious tracts. Gathers struck the victim

initially with his fist and the victim fell into another confederate Zandell Hayes and the victim "went wild." Hayes hit the victim and then Gathers and the victim continued tussling up the path on the ground. Haynes was eventually pinned to the ground and kicked and hit by a third confederate Dyonzoria Brown. Brown then picked up a bottle and struck Haynes in the head twice. Then Gathers picked up the bottle and hit the victim about three times in the head with the bottle until it broke while the victim was saying, "Oh, Lord." The victim then fell unconscious and some left. Gathers was still hitting the victim while the others left. Testimony was that he was striking the unconscious victim with an umbrella at this time about his back and head. (Tr. p. 587). According to Hardrick, he saw the victim's pants being down to about his thighs and

Gathers then used the top end of the umbrella and stuck it up the victim's anus while Haynes was groaning. (Tr. pp. 588-589). Hardrick testified that he and Gathers looked through Haynes' belongings, including his bags, looking for something to steal. (Tr. p. 592). When Gathers was going through them, he started throwing things everywhere, while the victim was still on the ground. (Tr. p. 592). As the Supreme Court of South Carolina held, during the altercation, they rummaged through his belongings and found two Bibles and various religious tracts. These articles were introduced into evidence at the guilt phase of the trial without objection.

After Gathers had inserted the umbrella, they left the scene and went to a nearby apartment complex. Gathers showed them a knife. Later they started

to return to the bike path, but Hardrick and Brown did not go. Gathers and Zandell Hayes went back to the victim. Upon returning, Gathers said that he had stabbed the victim. (Tr. p. 598).

The State of South Carolina charged Gathers with murder and sought the death penalty. During the guilt phase of the trial, the victim's mother, Reverend Dorothy Haynes, testified that her son had in his possession on the night of the murder various items including two Bibles, a plastic statue, rosary beads, olive oil, and a card on which was written "The Game Guy's Prayer." (Tr. pp. 565-567). Defense counsel affirmatively noted that he had "no objection" to the evidence being introduced. (Tr. pp. 560-568). Reverend Haynes also testified in the guilt phase that her son had mental problems and had been in and out of the

mental hospital three times in about two years. (Tr. pp. 561-563).

Officer Hazel of the Charleston City Police testified that upon arriving at the scene, he found the Bibles, the angel and personal papers laying to the right next to the body. (Tr. pp. 787-788). No question has ever been raised that the introduction of these items was probative as reflecting Haynes' possessions that the perpetrators reviewed for stealing. See (Tr. pp. 592-593).

The jury convicted Gathers of murder and criminal sexual conduct first degree. In the penalty phase, the state introduced all testimony from the guilt phase without objection from the defense counsel. (Tr. p. 1167). In mitigation, Gathers presented testimony attempting to impeach the forensic pathologist's opinion as to when the anal injury

occurred. (Tr. pp. 1169-1175). Also, Gathers' mother testified for mercy because he was a nice boy and was always helping people and doing things. (Tr. pp. 1182-1183).

The defendant's cousin testified about his family being a single parent family and his sisters' employment and educational status. She testified that his oldest sister Elvira was twenty-three years old living in Detroit and employed by the Highway Department. (Tr. p. 1186). Further, she testified that Ellena lived with her mother and was unemployed but attended a technical education school. Gathers' youngest sister was a fourteen year old high school freshman who also lived with her mother. (Tr. p. 1187). Gathers' brother, Mark Simmons, was thirteen years old. She also testified that the defendant was an affectionate child and

close to her son. (Tr. p. 1187). She claimed that his criminal problems developed from "other people telling Demetrius what to do when his mother told him what not to do. (Tr. p. 1188).

Gathers' sixth grade school teacher testified that Gathers was not one of her brighter students and she had "to force him to get what I want done." (Tr. p. 1191). She described him as an introvert, a follower, who wanted approval as a typical boy. She testified that he did not cause many problems. (Tr. p. 1193). His sister, Ellena, testified about how she felt about her brother. (Tr. pp. 1198-1199). She testified that they had always been close, always been a loving, caring person not to her but to a lot of people. (Tr. p. 1199). She said he had "always been honest with" her and was her "rock." (Tr. p. 1199). Further,

that many days he helped her, "but he has always been there." (Tr. p. 1199). In conclusion, she asked the jury to let him live. (Tr. p. 1199).

The Solicitor then began his closing argument on the law and the mitigating circumstances that the defense presented and told the jury to "look at the individual characteristics of this defendant and the crime." (Tr. p. 1205). The Solicitor described the heinous brutality that occurred on the evening of Mr. Haynes' murder.

Particularly, he stated:

And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strew them across the bike path, thinking nothing of that. Among the many cards that Reverend Haynes had among his belongings was this card. It's in

evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

(Tr. p. 1207, l. 20 - p. 1208, l. 13).

The prosecutor then read the card called "The Game Guy's Prayer" to the jury that was in evidence. He further commented that another item the defendant went through of the victim's was a voter registration card. (Tr. p. 1210). He stated that Haynes believed in his community and that "you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers." (Tr. pp. 1210-1211). The Solicitor concluded that "the proper verdict in this case is death." (Tr. p. 1211).

Defense counsel Sandlin then argued for the jury to continue to "demonstrate your high regard for human life." He urged the jury to remember that "Ricky Haynes is a victim and a victim I don't want you to forget ... [and] the clear implication is that he was a Christian." (Tr. p. 1212, ll. 18-23). Further, he argued for the jury "to think about what the implications of that Christian faith were and are and will be in the future." (Tr. pp. 1212-1213). He urged compassion and mercy and suggested that the question was "where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?" (Tr. p. 1214, ll. 5-8). He concluded that they were only "answerable to God" and "blessed are the merciful," (Tr. p. 1214, ll. 12-14).

After appropriate jury charges, the jury recommended a sentence of death on March 21, 1987. Judge Fields sentenced the defendant to death.

In the appeal to the South Carolina Supreme Court, the sentence of death was reversed on the basis of the prosecutorial comments relying on Booth v. Maryland, supra, because it focused "extensively on the personal characteristics of the victim." In particular, the State Supreme Court stated:

The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. Cf. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence.

(App. p. 47).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and reverse the judgment below because the South Carolina Supreme Court has fundamentally misconstrued this Court's decision in Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and the requirements of the Eighth Amendment as it relates to comments and consideration of a capital murder victim's characteristics.

Respondent further respectfully submits that certiorari is compelling and should be granted because Booth, supra, was wrongly decided by the plurality and has recently been strongly criticized by members of this Court in Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), (Rehnquist, C.J., joined by O'Connor, J., Scalia, J., and Kennedy, J. dissenting), wherein the dissent stated that he did not agree

with Booth or interpret Booth as foreclosing the introduction of all evidence, in whatever form, about a murder victim. Resolution of this conflict is necessary to provide clear guidance to the bench and bar on the limits of the introduction and comment on victim evidence.

I. The Eighth Amendment does not preclude Solicitor's comments on victim characteristics related to a crime.

We submit that the Eighth Amendment does not preclude comment on a victim's character that is directly related to evidence of the circumstances of the crime. Here, the victim was assaulted in a park by a malicious gang while he was inferentially practicing his religion by displaying his religious tracts and statues. The Eighth Amendment does not require a state to redact and neutralize the victim when the properly

admitted evidence reveals victim characteristics such as his religion, his mental or physical deficiencies, or whether the victim had in his possession at the time of the attempted theft a vote registration card. Here, items revealing the above were maliciously scattered around the victim's body by the defendant after he had rejected them as not worthy of theft. Are these items relevant in a capital trial because they reveal particular characteristics of the victim? We submit that they are and to the extent that the plurality Booth v. Maryland, supra, would suggest they are not, the decision is wrong under an appropriate Eighth Amendment analysis.

In a capital murder case, the sentencer "does not attempt to decide whether particular elements have been proved, but instead make a unique,

individualized judgment regarding the punishment that a particular person deserves." Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring). In California v. Ramos, 463 U.S. 992, 1008 (1983), the Court explained:

In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In facing a penalty, however, there is no similar 'central issue' from which the jury's attention may be divested. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury ..., the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

As this Court has consistently held, the factors considered by the capital sentencer must include "the character and record of the individual offender

and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

What the circumstances of the offense are should include who the victim was, what he was doing when the crime occurred. These factors are related to the Eighth Amendment concept of proportionality that requires "that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness." Enmund v. Florida, 458 U.S. 782, 823 (1982) (O'Connor, J. dissenting).

In this proceeding, the comments did not focus on the reputation of the victim and the effect on his family, but the circumstances of the crime over which the defendant had control, the choice of a vulnerable victim. The defendant may choose, or decline to premeditate, to act callously, to attack

a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses. Booth v. Maryland, supra, 107 S.Ct. at 2534, n. 7 (1987).

Certainly evidence of the characteristics of a victim that reflect his vulnerability that came from evidence of the offense are appropriate in an Eighth Amendment analysis. Here, the victim's slight build, his open vulnerability by preaching to any person and his mental problems, his location in the park with his religious items, reflect the character of the defendant who made his choice to attack his victim knowing these matters during the attack. This is not the type of evidence of personal qualities of a victim such as standing in the community that the Eighth Amendment was concerned with. This evidence and comment were not sought to be rebutted, but rather were

relied upon by the defense in their closing argument when they asked the jury what the victim and his Christianity would ask them to do concerning taking another's life.

In this case, as reflected by the mitigation evidence, as in all death penalty cases, virtually no limits are placed on the mitigating evidence a defendant may introduce concerning his own history and circumstances, yet the State, under Booth may be precluded from demonstrating similar characteristics, relevant to the crime, and how or why the victim placed himself in a vulnerable position. If a jury is to access the defendant's moral culpability and blameworthiness, one consideration must be information about the murder victim. If this information also reflects the extent of the harm caused by the crime on the family or

society as a whole, it should not be error. Similarly, if a victim was a President or a Mayor whose loss clearly affected society, the fact of this status should not be seen as an Eighth Amendment violation when it is brought to a jury's attention. Clearly, when a defendant, as here, is aware of the personal characteristics at the time of the crime, the time of his selection of the victim, there is no violation. The prosecution is not required under the Eighth Amendment to stand mute when these facts are in the record to assess the defendant's blameworthiness and moral culpability. It speaks of the defendant and the appropriate punishment the law demands.

II. The decision of the South Carolina Supreme Court misconstrued
Booth v. Maryland, supra.

The South Carolina Supreme Court held that Booth v. Maryland, supra, was violated because the Solicitor generally commented on evidence presented earlier that the victim was a small, religious person with mental problems who possessed a voter registration card. These comments derived from non-objected guilt phase evidence from his mother about his leaving the house with his religious tracts as a self-proclaimed minister who preaches to everyone and the immediate circumstances of the crime when he was brutally killed while in a park with his religious items laid out on a park bench and his possessions subsequently scattered around him while the perpetrators looked for something to steal. The Solicitor's direct reference in closing argument to this evidence which necessarily revealed information about the victim's and defendant's

characteristics did not violate Booth v. Maryland, supra.

In Booth v. Maryland, supra, the plurality of the Supreme Court stated that the disapproval of statutory victim impact statements does not mean this type of information will never be relevant. "Similar types of information may well be admissible because they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2529, n. 10. More recently in Mills v. Maryland, supra, the dissent found no Booth violation in introduction of evidence that revealed "a thumbnail sketch of the victim's difficult childhood and frequent encounters with correctional authorities."

Clearly, the information present here was not the same type of information presented on the victim impact statement (VIS) in Booth. There,

the VIS included information from family members on the character and reputation of the victims and their status in the community. The VIS further related the problems the victim's family members were having with the deaths. This is a far cry from the situation here where the information now complained of directly bears upon the crime and its motive.

Here, the fact that the victim was religious was directly connected to a circumstance of the crime -- his apparent study (or preaching) of his religious beliefs when he was accosted. Further, his mental problems directly related to his vulnerability at the hands of the gang of perpetrators that came upon him that night. The voter registration card was another item left after they had scattered his belongings looking for something to steal while the

victim sought peace of mind in the city park.

In Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974), this Court stated that "a court should not lightly infer that a prosecutor intended an ambiguous remark to have its most damaging meaning." Here, the South Carolina Supreme Court's analysis of Booth could be seen to require the prosecutor to sanitize and redact any characteristics of the victim from the case for fear that the evidence could be seen to be arbitrary. If it is correct that whether it is error to comment that a victim was small and religious when he was attacked by four perpetrators after he was apparently practicing his religion, it is a logical next step that comments that a burglary victim lived alone and was elderly and weak would be similarly infirm. The Constitution does

not require that conclusion.

Unlike the "sterling member of the community" comparison decried in Booth that had little nexus with the crime, here the characteristics evolved out of the crime itself. Simply put, it was the state's theory of the case that the motive and reason that Ricky Haynes was assaulted and murdered was because he was a vulnerable and likely victim suffering from some mental disability who was willing to talk to people all the time about the Lord from the park bench until the heinous brutality inflicted by Demetrius Gathers occurred.

The Eleventh Circuit in Brooks v. Kemp, 782 F.2d 1383 (11th Cir. 1985) (en banc), vacated on other grounds in Kemp v. Brooks, ___ U.S. ___, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), stated:

While argument focusing on the victim can be dangerous, not all prosecutorial references to the victim are improper. The fact that

there is a victim, and the facts about the victim properly developed during the course of the trial, are not so far outside the realm of 'circumstances of the crime' that mere mention will always be problematic. It is not necessary that the sentencing decision be made in a context in which the victim is a mere abstraction.

762 F.2d 1409. The South Carolina Supreme Court's restrictive reading of Booth requires a new sentencing when there are extensive comments as the victim's character that "were unnecessary to an understanding of the circumstances of the crime." The test in Booth is not whether the victim evidence was "necessary" for an understanding of the crime in light of other evidence, but rather whether "they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2529, n. 10. The state court's interpretation of Booth is in error and demands vacation.

CONCLUSION

For the reasons stated herein,
Petitioners urge this Court to grant the
writ of certiorari.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
in The Supreme Court

The State Respondent,
v.
Demetrius Gathers Appellant.

Appeal from Charleston County
Richard E. Fields, Judge

Opinion No. 22878
Heard March 8, 1983 - Filed June 6, 1988

AFFIRMED IN PART: REVERSED IN PART: AND
REMANDED

Assistant Appellate Defender Joseph L. Savitz, of the South Carolina Office of Appellate Defense, of Columbia; and Public Defender Joseph F. Kent, of Charleston for Appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, both of Columbia; and Solicitor Charles M. Condon, of Charleston, for Respondent.

GREGORY, C.J. Appellant was convicted of murder and first degree criminal sexual conduct and sentenced to death. We affirm his convictions, reverse the death sentence, and remand for a new sentencing proceeding.

The victim, Richard Haynes, was a thirty-two-year-old black male. He was a self-proclaimed preacher and called himself "Reverend Minister." Haynes was attacked and killed by four black youths. He was stabbed in the stomach, beaten on the head with a bottle, and his rectum perforated by an umbrella inserted in his anus.

One of the four youths, Steven Hardrick, agreed to testify for the state in exchange for a guilty plea to misprision of a felony. Hardrick testified that he and three others, including appellant, came across the victim late one night at a park bench on a

bicycle path. The victim was changing his clothes. Appellant and the victim exchanged some words and appellant then struck the victim in the face. Another youth, Zandell Hayes, also struck the victim. Appellant pinned the victim to the ground while a third youth, Dee Brown, kicked and beat him. They then smashed a bottle on the victim's head.

When the victim stopped moving, Hardrick nudged him with his foot. Hardrick, Brown, and Hayes then left the scene while appellant remained with the victim. The others looked back and saw appellant beating the victim with an umbrella. Hardrick saw appellant push the umbrella into the victim's anus. Appellant then rejoined the others. Appellant and Hayes, however, returned to the victim once more. Appellant said he stabbed the victim with a knife.

During the altercation, the youths rummaged through the victim's belongings and found two Bibles and various religious articles. These articles were admitted into evidence at the guilt phase of trial.

Appellant confessed to his involvement in the murder but claimed Brown was the main aggressor.

GUILT PHASE

Appellant complains the solicitor injected an arbitrary factor into the jury's deliberation of guilt by attacking appellant's character when appellant had not put his character in issue. The solicitor stated:

Let me first stop to point this out. Someone like Demetrius Gathers is not going to be talking about what he did to the minister over here at the Episcopal Church on the corner or the pastor at Morris Brown A.M.E. Church. Who is he going to be talking to: His own ilk. Who is that? Well, you have people out there like Rose Campbell; Jerome Heyward; James,

known as Jeff, Carter. You had a chance to evaluate them. They weren't your sterling citizens that come forward after they heard about all this, but they did testify, and you did have a chance to hear what they had to say.

What do all of them say, to a person? And why would they make this up? They all agree -- again Steven Hardrick has been corroborated -- that this defendant, this defendant along with Zandell Hayes, went back on that track after they left, just as Steven Hardrick told you. It's been corroborated and corroborated again. So it's just not Steven Hardrick's word.

The persons named by the solicitor are those who testified regarding what appellant said he had done to the victim. Appellant argues the solicitor's statements imply appellant is a person of bad character by association. We disagree.

Taken in context, these remarks were not an improper comment on appellant's character. The solicitor's argument concerning the credibility of the State's witnesses is within the

record and its reasonable inferences.

State v. Cockerham, ___ S.C. ___, 365

S.E.2d 22 (1988); State v. Durden, 264

S.C. 86, 212 S.E.2d 587 (1975). We find

no error.

Appellant next contends the solicitor improperly disparaged the exercise of his constitutional rights and contrasted those rights with "the trial and execution" of the victim.

The solicitor's comments regarding appellant's rights to a lawyer and to remain silent are in reference to the voluntariness of appellant's confession, a factual issue submitted to the jury and therefore properly argued.

The solicitor also referred to appellant's right to confront witnesses and stated: "Contrast that in your mind's eye with the trial and the execution of Richard Haynes." This single comment does not rise to the

level of prejudice found in State v. Cockerham, supra, where the solicitor's extensive comments constituted reversible error. In the context of the entire record, we hold any error harmless beyond a reasonable doubt. State v. Cockerham, supra; see also State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987).

Next, appellant claims the trial judge should have sua sponte charged the jury on a defense of alibi based on his first pre-arrest statement to police that he was not at the scene at the time of the murder. We disagree.

Appellant first stated he was at Rose Campbell's home at Starcastle Apartments from 9:30 p.m. until 1:00 or 1:30 a.m. the night of the murder. The record indicates the murder occurred between 10:00 to 11:00 p.m. on the bicycle path behind Starcastle Apart-

ments. This pre-arrest statement was introduced into evidence by the State to show appellant changed his story when he later confessed to some involvement in the murder.

Appellant did not raise a defense of alibi at trial. In fact, his lawyer stated at the commencement of trial; "For the record . . . there will be no evidence of alibi." During closing argument, defense counsel further stated: "There is no question that he [appellant] was involved in beating him up."

In light of appellant's disavowal of an alibi defense, it was clearly proper that the trial judge did not charge alibi. Moreover, in view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985).

Next, appellant complains the trial judge improperly charged the jury on implied malice.

The trial judge charged the jury that malice may be implied from the intentional doing of an unlawful act where no excuse or legal provocation appears. This charge was proper. State v. Crocker, 272 S.C. 344, 251 S.E.2d 764 (1979). Appellant contends, however, the trial judge's charge requiring the jury to determine guilt or innocence "based upon the evidence" impermissibly shifted the burden to appellant to prove an excuse.

This argument is without merit. Nowhere in the charge does the judge mention the need for rebuttal or explanation of the evidence presented by the State. Moreover, the judge's charge comports with the requirement that it is for the jury to determine from all the

evidence whether or not malice is proven. State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986).

Appellant next contends his conviction for first degree criminal sexual conduct should be reversed because of an alleged violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). We disagree.

Pursuant to appellant's request for disclosure of evidence, the State provided an autopsy report prepared by Dr. Conradi. The report stated that the rectal wound was a contributory injury. At her meeting with defense counsel before trial, Dr. Conradi explained the sexual battery occurred "perimortem" or as death was occurring.

Appellant complains the State did not disclose evidence that Dr. Conradi equivocated as to whether the rectal wound was pre- or post-mortem at an

early interview with a co-defendant's counsel. He contends this information would have allowed effective impeachment of Dr. Conradi at trial.

In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record. State v. Osborn, 291 S.C. 265, 353 S.E.2d 276 (1987). The State's failure to disclose information warrants a reversal as a Brady violation only if the omission deprived the defendant of a fair trial. Id.; State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981); see also U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant effectively cross-examined Dr. Conradi at trial and she conceded she had previously expressed an opinion she was unsure whether the rectal wound was before or after death. She further explained it was now her firm opinion

the wound was pre-mortem. Because appellant has failed to show any prejudice from the alleged nondisclosure, we hold there was no error.

Accordingly, we affirm appellant's convictions for murder and first degree criminal sexual conduct.

SENTENCING PHASE

Appellant contends the solicitor's closing argument at the sentencing phase of trial violated Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. We agree.

The solicitor's argument included these remarks:

We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there.

... Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his

beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers cared little about the fact that he is a religious person. ... But look at Reverend Minister Haynes' prayer. It's called "The Game Guy's Prayer." "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you 100% of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full on knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me always to play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and to think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of

luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frame-up or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life." Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.

...

Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. It speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend Haynes believed in this

community. He took part. And he believed that in Charleston County, in the United States of America that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.

In Booth, the United States Supreme Court held the victim's personal characteristics are not proper sentencing considerations in a capital case. 107 S.Ct. at 2535. The Court reasoned there is no justification for permitting a capital sentencing decision "to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." 107 S.Ct. at 2534. Moreover, it would be impossible to provide the defendant "a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." 107 S.Ct. at 2535. The Court concluded the injection of the

victim's personal characteristics into the sentencing determination violated the Eighth Amendment.

The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. Cf. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1981). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. Accord State v. Gaskins, supra (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

We need not address appellant's remaining exceptions. Appellant's convictions are affirmed, the death

sentence reversed, and the case is remanded for a new sentencing proceeding.

AFFIRMED IN PART: REVERSED IN PART:
AND REMANDED.

HARWELL, CHANDLER, FINNEY, JJ., and
Acting Associate Justice J. B. Ness,
concur.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

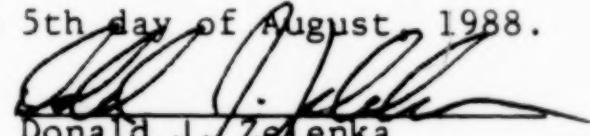
STATE OF SOUTH CAROLINA,
Petitioner,

versus
DEMETRIUS GATHERS,
Respondent.

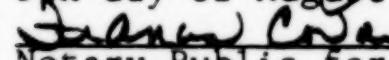
AFFIDAVIT OF FILING

PERSONALLY appeared before me,
Donald J. Zelenka, who being duly sworn,
deposes and says that he is a member of
the Bar of this Court and that on this
date he filed the original and forty
copies of Petition for Writ of
Certiorari to the Supreme Court of the
State of South Carolina in the above
captioned case by depositing same in the
U. S. Mail, first-class postage prepaid,
and properly addressed to the Clerk of
this Court.

This 5th day of August 1988.


Donald J. Zelenka

SWORN to before me this
5th day of August, 1988.


(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

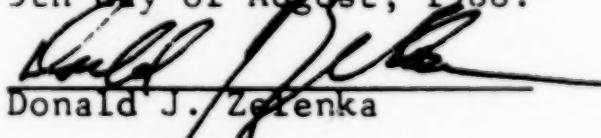
STATE OF SOUTH CAROLINA,
Petitioner,

versus
DEMETRIUS GATHERS,
Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to Joseph L. Savitz, III, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 5th day of August, 1988.


Donald J. Zelenka

SWORN to before me this
5th day of August, 1988.


(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.